Culture, Tourism, Europe and External Relations Committee

15th Meeting, 15 December 2016

The Implications of the EU referendum for Scotland: EU nationals and their rights

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1. The proposal suggested by myself and Professor Anand Menon in our Open Europe note\(^1\) reflects the principle expressed in the Smith Commission that the Scottish people has a sovereign right to determine the form of government best suited to its needs.\(^2\) In this regard, Scots were presented with a situation on 24 June whereby the system of government for which they had voted in two recent referenda, namely remaining within a United Kingdom which is a member of the European Union, was no longer available to them.

2. One option is to choose between their two choices: remaining within the United Kingdom or remaining within the European Union. Such a choice, without a further referendum, would seem to go against the principle set out above by the Smith Commission. Even with a referendum, it might prove to be a very divisive choice. Without seeking to prejudge the right of Scots to make such a choice in the future, we, therefore, sought to make a proposal which we believed approximated the combined outcomes of the two referenda.

3. This note sets out that any arrangement will only be an approximation. It seeks to address some of the central challenges facing such an arrangement, setting out how they could be broached. It should be emphasised that it is only a briefing note and not a detailed piece of research, which is intended to do no more than put certain ideas in the public sphere.

4. It considers four salient elements. There is, first, how Scotland’s voice within the EU Institutions will be secured in light of the limits on its formal participation. Secondly, as Scotland lacks certain independent institutions and powers that are necessary for the functioning of EU law and policy within Scotland, what substitutes can be put in place. Thirdly, it considers the question of free movement of persons in the light of the passport union with the rest of the United Kingdom (roUK). Fourthly, it looks at free movement of goods in the light of the customs union with the EU or United Kingdom.

**Participation in EU Institutions**

5. If Scotland is not to be a rule-taker, it is important that it be able to exercise voice within the EU Institutions.
6. This voice could be accommodated within the Council in a number of ways. There is nothing to stop Scotland participating in COREPER, for example, which

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prepares the meetings for the Council, and where most Member State negotiations take place.\(^3\) Equally, in preparing for the trilogue, the meeting where legislative deals are made between the Institutions, the State holding the Presidency could take account of the Scottish Government’s position in just the same way as it does for governments of Member States. In situations where there is Qualified Majority voting (over 80% of the time), there would not be much of a loss in influence. Most decisions are taken by consensus, and this is likely to increase when the United Kingdom leaves. Even when they are not, Scotland, as a State with a small population, has very limited voting power.\(^4\) The challenge is when decisions are taken by unanimity. Other States could agree to something which goes against Scottish interests, and which it would have a veto if it were a Member State. There may be a case for a provision which states that Scotland could ask for some accommodation where a decision taken by unanimity prejudices vital national interests.

7. The European Parliament is also relatively unproblematic. Most of this Institution’s work is done in its Committees where it reviews the work of the other EU Institutions and examines EU legislative proposals. Whilst MSPs could not be Chairs or Rapporteurs of these Committees, one could imagine MSPs participating in the work of these Committees with a commitment in the European Parliament’s Rules of Procedure to give their views as much weight as those of MEPs on the Committee.\(^5\)

8. It may well be possible for the First Minister to attend meetings of Heads of the EU States when they meet in this capacity or as informal meetings of the European Council. Beyond that, Scottish voice could be fed into its processes with the possibility for her to present the views of the Scottish Government to the President of the European Council and for him to report back to her afterwards.

9. With the Commission, I would advise that the Scottish government push for the Scottish parliament to be granted the same status as national parliaments with regard to the pre-legislative and legislative dialogue that currently takes place between these and EU Institutions.\(^6\) This would allow it to input not only into all Commission proposals, but also the latter’s Green Papers, White Papers and Communications. It would also allow for regular two way contact between Commission officials and the Scottish Parliament. A challenge with this dialogue has, to date, been the failure of many national parliaments to exploit the possibilities offered by it.\(^7\) If the Scottish parliament were to liaise with the Scottish Government in an effective manner, I believe that this would garner as much if not more influence within the Commission as having an individual Commissioner as it would be able to exert voice across all areas of Commission policy-making at an early stage.

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\(^3\) Article 240 TFEU talks of the representatives of the Governments of the Member States preparing the meeting. There is nothing to suggest that this provision is exclusive, however, and other parties cannot be involved.

\(^4\) The usual threshold for Qualified Majority voting, after Brexit, will be fifteen States representing at 65% of the population with at least four States having to vote against a measure to block it, Article 16(4) TEU.

\(^5\) There is nothing in the current Rules of Procedure which prevents this at the moment, albeit that these would almost certainly have to be modified.

\(^6\) This is set out in the Protocol on the Role of National Parliaments in the European Union, articles 1 and 2.

Economic Policy and Foreign Policy

10. There are a number of fields where Scotland does not currently have the institutions which enable it to participate and be accountable in the manner that Member States currently are within the European Union. It does not have an independent economic or employment policy and, as such it would be difficult for the Union to establish guidelines for it or monitor its performance. It cannot sign treaties. This would be particularly problematic with regard to treaties with non EU States which are concluded by the European Union but not the United Kingdom. How confident would these States be about Scottish performance, for example, if the EU and other States ratified a climate change convention with them but the United Kingdom did not participate? Most challengingly, only Member States governments can be taken before the Court of Justice under the infringement proceedings.

11. These issues raise different problem. I will deal with them in terms of their ease.

12. The infringement proceedings is likely to be the most salient. The European Union will wish Scotland to be subject to this as these proceeding are the central vehicle for enforcing most EU law. Parallel proceedings exist therefore for EFTA States within the European Economic Area. This could be provided for in the eventual treaty setting out the United Kingdom and Scotland’s relations with the European Union. It would provide that the Commission, under conditions identical to those set out under Articles 258 and 260 TFEU, could bring the Scottish Government before the Court of Justice and that the latter’s judgments would have identical legal effects to those in EU law. Provision could also be made in the agreement for the Scottish Government to bring other Member States before the Court of Justice under procedures identical to those in Article 259 TFEU.

13. The impossibility of Scotland being able to sign international treaties could be met through a procedure which amplifies the current duties of cooperation required of Member States in Article 4(3) TEU. This requires Member States not to do anything which would frustrate the attainment of Union objectives. The procedure applying this duty in external relations to Scotland would, therefore, allow Scottish representatives to be consulted by the Commission in the same way as Member State governments and to participate in any discussions between national governments. There would be a legal commitment on Scotland to implement any agreement concluded by the European Union on the matters that fall both within and outside EU competence. As Scotland could not unilaterally give such a commitment, the mandate could be provided by the secession treaty between the United Kingdom and the European Union so that it was a commitment which bound the United Kingdom as a whole.

14. The biggest challenge concerns formulating and reporting on policies for which Scotland has no institutions of its own, notably in economic, monetary and employment policy. The United Kingdom has currently committed to the European Union not to run excessive imbalances in macroeconomic policy or to have an

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8 The Court of Justice gives more judgments under the preliminary reference procedure through which it receives references on points of EU law from national courts. These references are confined to quite narrow fields of EU law. On this see D. Chalmers & M. Chaves,'The Reference Points of EU Judicial Politics' (2012) 19 Journal of European Public Policy 25
excessive budget deficit; to have stable prices and sound balance of payments, and to have a coordinated employment strategy. No real sanctions are applied for not doing these. However, it will be difficult for the Scottish Government to report even on these matters as it would inevitably mean holding up roUK policies, some quite sensitive, for external assessment by the European Union, and it is unlikely that the roUK would be comfortable with this. Probably the best which can be offered here is that the Scottish Institutions commit to formulate and report on these fields insofar as these fall within their competence.

Free Movement of Persons and EU Citizenship

15. There is no reason why Scotland could not continue to enjoy free movement of persons with the European Union whilst retaining a passport union with the rest of the United Kingdom. There would be a number of dimensions to managing such a relationship.

16. The right of residence is granted to three categories of EU citizen: the employed and self-employed; the economically self-sufficient, and students who make a declaration that they are self-sufficient. Any regime has to secure the rights of these within Scotland but not the roUK, and secure robust controls on the circumvention of roUK immigration laws.

17. Access to the market for both the employed and self-employment is secured through National Insurance numbers. It is illegal to be employed or self-employed without these, and whilst these are currently used for fiscal purposes, there is no reason why grant of these could not be used to secure the rights of EU citizens to work or be self-employed in Scotland but not in the roUK. It would involve Scotland having to be devolved powers to issue these, and such numbers being clearly marked so that they only entitle employment and self-employment within Scotland. The competence to issue such powers would have no implications for the allocation of fiscal powers between Scotland and roUK as payments made under these numbers would be treated like any other National Insurance contribution. Policing for employment would be relatively simple as employment authorities in the roUK would have access to these numbers, and if a roUK employer sought to employ an EU citizen illegally it would flag up in the system. More challenging is the position of the self-employed. In particular, an EU citizen might register in Scotland but then carry out her business in roUK. One way to prevent this would to be impose regular duties on self-employed EU citizens resident in Scotland to file regular receipts, and not simply as part of the annual self-assessment. This should determine where the work was carried out.

18. The management of self-sufficient EU citizens and students could be done through the current requirements in EU law which allow Member States to require these to register with them. As part of this registration process, they can ask to see that the EU citizen meets the requirements for residence. A further requirement which might be necessary in the case of Scotland to ask for proof of address within Scotland to ensure that the EU citizen is living there rather than within the roUK. This

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9 Directive 2004/38, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004, L 158/77, article 7(1). The right is also granted to family members of these, but this right is, at the moment of entry at least, a derived right.

could probably be legitimately required under EU law, but legal security would be greatly secured if this was also explicitly secured in any treaty.

19. Scottish citizens could secure reciprocal rights in EEA States by acquiring documents which certify their residence in Scotland and their British citizenship, and which would, in turn, be accepted by EEA States as entitling them to the rights to free movement and residence. Any treaty should provide for this explicitly, as EU law currently allows for free movement on the basis of presence of a passport or a national identity card, and such a document would almost certainly be classified as neither.

20. A central concern would be that EU citizens could evade roUK immigration controls through entry via Scotland. The risk of irregular economic migration is slight, as there would be few upsides for an EU citizen to seek irregular economic activity in the United Kingdom when they could seek regular economic activity in all surrounding States. However, there would still be a concern about EU citizens who are considered a threat to public policy and whom the roUK authorities might wish to deny entry or to deport.

21. These citizens fall into two categories.

22. There are, first, those who could currently be denied entry or deported under EU law. There is no reason that these should pose significantly more problems entering through Scotland than through roUK. EU law currently gives these a right to seek judicial review any decision and, if they are currently resident in the United Kingdom, for deportation to be suspended until judicial review has taken place unless a judicial decision has been taken previously or there are imperative grounds of security. This might impose additional costs for the Scottish authorities which are not borne by roUK authorities, but it is difficult to see it creating significant dangers of irregular entry for roUK.

23. The second category concerns EU citizens who cannot currently denied entry or deported on grounds of public policy under EU law, but might be subject to denial of entry or refusal by roUK in the future. It is likely that some EU citizens will fall into this category as the Home Secretary indicated in her speech to Conservative Party Conference that she wanted to align the deportation of EU criminals with those of non EU criminals. It is worth noting that the groups falling into this category are those committing minor crimes and those considered to pose minimal risk of reoffending. Any EU citizen associated with significant criminal activity can be denied entry or deported if there is a possibility of this persisting, albeit account should be taken of length of residence, age, state of health, the citizen’s family and economic situation, their social and cultural integration into the host Member State and the extent of their links with their country of origin.

11 Directive 2004/38, articles 6 and 8(3).
13 http://blogs.spectator.co.uk/2016/10/full-text-amber-rudds-conference-speech/
24. Even with a national register, it will be difficult to prevent such citizens travelling to the roUK without controls on transport between Scotland and the roUK. The best way to allay roUK concerns involves a combination of three measures.

25. The first is to make use of an option provided by EU law which is to seek the police record of any EU citizen coming to reside in Scotland from other EU States as a matter of course. At the moment, this can only be done if considered essential.\textsuperscript{15} It could be argued, however, that the passport union with the United Kingdom makes securing police records essential to preventing internal control within the United Kingdom. The second is to agree with the EU and the roUK, a common definition of those who could be refused entry or deported on grounds of public policy. This might be different from that deployed in the rest of the EU. Particular concerns have been focussed on removing the risk of reoffending as a precondition for deportation or denial of entry. The February settlement which formed the basis for the referendum provided that:

‘Member States may take into account past conduct of the individual concerned and the threat may not always need to be imminent. Even in the absence of a previous criminal conviction, Member States may act on preventative grounds, so long as they are specific to the individual concerned.’\textsuperscript{16}

There is a case for special pleading with the European Union that this test should form the basis for determining when somebody can be deported or refused entry rather than that by the Court of Justice which does not allow States to act on preventative grounds. The case for such special pleading would not simply be Scottish participation but that the European Council has already identified this as a suitable threshold for the whole of the European Union and not just the United Kingdom. In line with the policy announced at the Conservative Party Conference, the Scottish Government may also want to clarify in the arrangement that commission of minor offences can provide a basis for deportation or denial of entry, albeit one that may have to be balance against the factors outlined above. At the moment, there is uncertainty in EU law as to whether this is the case.

**Customs Union**

26. This is the most difficult of all the issues confronting Scottish alignment with EU law and participation in EU decision-making. Scottish participation in the EU customs union will provide incentives for traders to import into the EU via the United Kingdom and then through Scotland to evade EU customs duties and other commercial policy measures and to import into the United Kingdom through Scotland from the EU to evade roUK duties and controls. The standard response to such issues would be to impose customs controls between Scotland and the roUK, but this would almost certainly be politically unacceptable across the United Kingdom.

27. A parallel challenge exists between Northern Ireland and the Republic of Ireland where the British government states that it does not want the re-establishment of controls. In his evidence to the House of Commons Foreign Affairs Committee on 13 December 2015, the Secretary of State for Exiting the European

\textsuperscript{15} Article 27(3)

\textsuperscript{16}‘A New Settlement for the United Kingdom within the European Union’, OJ 2016, C 69/1.
Union suggested the model adopted between Norway and Sweden was being considered.\(^\text{17}\) Norway is, of course, part of the single market but not part of the EU customs union. This model involves one State, be it Sweden/Finland or Norway, administering on any batch of goods the checks required by both States. It is a form of administrative simplification, no more. As such, whilst there is much to be said for it being used more generally to facilitate trade between the United Kingdom and the European Union if the former does not remain in the customs union. It does not secure liberalised trade as controls would still have to be present, and there are still, occasionally, delays on that border.

28. There is another precedent. This is the 1957 Protocol on Inter German trade and Connected Problems. This dealt with the situation of the German Democratic Republic prior to reunification. German constitutional law viewed the then divided Germany as a single territory and customs union in its own right. Other Member States applied customs duties and other commercial policy measures to goods coming from the German Democratic Republic. The solution was thus potentially analogous to that in the United Kingdom where one part of the State formed part of the EU customs union and the other did not. The solution was to allow individual States to take safeguard measures to counter any difficulties caused by goods coming from the German Democratic Republic.

29. Relatively few difficulties for other Member States were provoked by inter German trade.\(^\text{18}\) This might not be seen therefore as a model for Scottish-EU trade relations. However, it could be combined with the Union Customs Code which provides for differential treatment of goods within the European Union which are suspected to be non EU goods.\(^\text{19}\) The Code provides at article 61(3):

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\text{‘Where the exigencies of trade so require, a document proving origin may be issued in the Union in accordance with the rules of origin in force in the country or territory of destination or any other method identifying the country where the goods were wholly obtained or underwent their last substantial transformation.’}
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Importers operating in Scotland could be required to apply to the Scottish authorities to certify origin of their goods or services where they believed that this might be necessary to secure customs free access to either the EU or roUK market. This would be a heavy constraint if this were required of all goods which potentially were to be sold in either the EU or the roUK. A modified version would be to require a certificate of origin only for a time limited period in sectors where the Commission or the British Government had identified significant levels (or a high likelihood thereof) of abuse of the free movement principle. This identification would have to be supported by evidence. There would, then, be an onus on the Scottish authorities to curb the problem. There would also be incentives for honest traders to report operators cheating the system as they would be suffering not only a competitive disadvantage vis-à-vis the latter but also the risk of increased regulatory costs.

\(^\text{17}\) A similar arrangement exists between Norway and Finland. Preceding EU membership, these arrangements are now contained in an Agreement on Customs Cooperation between the Kingdom of Norway and the European Communities, OJ 1997, L 105/17. The central provision is article 3.

\(^\text{18}\) See the Hansard debate ‘EEC and Internal German Trade’, HL Deb 12 December 1973 vol 347 cc1151-3.

\(^\text{19}\) Regulation 952/2013 laying down the Union Customs Code, OJ 2013, L 269/1.